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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO SOLICITOR GENERAL'S MEMORANDUM ON BEHALF OF UNITED STATES, AMICUS CURIAE

JESSE FREIDIN
Attorney for Petitioner
598 Madison Avenue
New York 22, New York

HERBERT PRASHKER
598 Madison Avenue
New York 22, New York
Of Counsel

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Following the filing of Petitioner's reply brief dated February 18, 1964, the Solicitor General filed a "Memorandum for the United States as Amicus Curiae", urging this Court to deny the petition for certiorari on the ground that "the issue does not appear to be of sufficient importance in the field of labor management relations to call for a resolution by this Court in the absence of a conflict [i.e., between Courts of Appeal]."

We believe the Solicitor General's Memorandum calls for brief comment from the Petitioner, and not simply because the Solicitor General has taken the unusual step of asking this Court *not* to grant certiorari in a case to

which the United States is not a party. For the Memorandum contains disclosures of information not otherwise available to this Court which confirm, in our view, the importance of the issue presented and the necessity for this Court's intervention:

a) In dealing with Respondents' contention that the Court of Appeal's decision settled the law, and that review by this Court was accordingly unnecessary, Petitioner's earlier Reply Brief stated that there was no reason for assuming that the National Mediation Board would now accept the Ninth Circuit's limiting construction of NMB jurisdiction, and abandon its historical position that its jurisdiction extended to certain non-transportation activities of air carriers (Reply Brief, pp. 2-3). The Solicitor General now tells us that the NMB does in fact adhere to its position, despite the Court of Appeals decision:

> "The National Mediation Board is of the view that the [Railway Labor] Act does apply to Pan American's employees at the Nevada test site." (Memorandum, p. 6).

And the Solicitor General's exposition of the NMB's position (pp. 6-10) makes clear that the Board likewise adheres to its 1956 determination that the Railway Labor Act similarly applies to 4,000 Pan American space operation employees at Cape Kennedy. We think it fair to assume, therefore, that Pan American and other air carriers similarly situated will be caught in a conflict unless and until this Court acts to resolve the issue—the NMB will continue to call upon the carriers and the affected labor organizations to perform their respective obligations under the RLA and the Courts of the Ninth Circuit, at least, will decline to enforce those obligations.

b) The Solicitor General states that the National Labor Relations Board believes that the RLA does *not* apply to Pan American's Nevada Test Site operations. (Memorandum, p. 4).* Presumably, the NLRB likewise believes that the RLA does not apply to Pan American's operations at Cape Kennedy. And since, as the Solicitor General says, the RLA and the NLRA are mutually exclusive, the NLRB must be understood as believing that the NLRA *is* applicable to these employees, and that the NLRB, not the NMB has jurisdiction.

c) The Solicitor General indicates that, in view of this conflict between the two federal agencies as to which Act applies, and as to which of the two agencies has jurisdiction, *both agencies* desire that the petition for certiorari be granted. Thus:

> "Both the Labor Board and the Mediation Board would like a definitive ruling upon the jurisdictional question presented without waiting to see whether other circuits will accept the decision of the Ninth Circuit or a conflict will develop." (Memorandum, p. 10).

That "definitive ruling," of course, can come only from this Court.

The Solicitor General confirms that the decision of the Ninth Circuit, rather than settling the issue, is likely to lead

*The question is now formally pending before the NLRB in the form of a representation petition filed with it under §9(c) of the National Labor Relations Act for the very employees involved in this case (B & CT: p. 19a). Since the NLRB has not yet even ordered a hearing on the petition, we must presume that the NLRB position stated by the Solicitor General represents an informal expression of the Board's view, obtained by the Solicitor General for the purposes of the current proceedings in this Court.

to "further litigation" (Memorandum, p. 10),* and "might lead to significant labor unrest at one highly important government installation" (Memorandum, p. 13). In the face of the unsettling consequences which may follow a refusal of this Court to grant certiorari, in the face of the persisting conflict between the two principal national labor agencies as to their respective jurisdictions, and in the face of *their* joint desire that this Court settle that conflict now, the Solicitor General nevertheless purports that this Court should deny certiorari (p. 13).

As we understand it, the United States has at least four separate interests in the controversy now before this Court, each of which suggests that certiorari be granted:

1) The interest of the National Mediation Board in the definition of its jurisdiction. The Solicitor Gen-

*The Solicitor General characterizes the *amount* of such resultant litigation as "slight" (p. 13). There is at least a reasonable probability that the litigation will be anything but "slight." There is, to begin with, a pending representation petition before the NLRB covering the Nevada Test Site employees. It may be that the NLRB will not process that petition despite its own view that it has jurisdiction; the NLRB has indicated, for at least the last 20 years that it will decline to assert jurisdiction in cases of this kind, unless the NMB, "the agency primarily vested with jurisdiction [over air carriers] by terms of the Railway Labor Act," has explicitly declined to assume jurisdiction. *Northwest Airlines, Inc.*, 47 NLRB 498, 501-2 (1943); see also *Pan American World Airways, Inc.*, 115 NLRB 493, 495 (1956). If the NLRB persists in its policy of deference to the NMB, we may have less litigation, but more anarchy. If the NLRB determines to proceed, however, we may have proceedings to enjoin the NLRB from conducting an election for want of jurisdiction (*NLRB* v. *Sociedad Nacional de Marianos de Honduras*, 372 F. 2d 10 (C.A. 5, 1963)) (indeed, we may have comparable proceedings to enjoin the NMB from continuing to assert jurisdiction). If the NLRB asserts jurisdiction we may also have unfair labor practice proceedings under NLRA § 10(b), enforcement or review proceedings under NLRA §§ 10(e) or (f), injunction proceedings under NLRA §§ 10(j) or (l), or work assignment dispute proceedings under NLRA § 10(k). In each of these proceedings the question whether the RLA or the NLRA applies and whether the NMB or the NLRB had jurisdiction will be in issue.

eral tells us that the NMB desires that certiorari be granted.

2) The interest of the National Labor Relations Board in the definition of *its* jurisdiction. The Solicitor General tells us that the NLRB desires that certiorari be granted.

3) The interest of the Atomic Energy Commission in avoiding disruption of operations at the Nevada Test Site. The affidavit of the AEC's cognizant officer in the record before this Court states that the picketing which Pan American has here sought to enjoin as unlawful under the Railway Labor Act would "have extremely serious consequences" (Pet., p. 72a), "will result in substantial irreparable injury to the ROVER program" (id., 76a), and would have "adverse effects on the advanced activities of the United States space program" (Pet. 77a).

4) The interest of the National Air Force and the National Aeronautics and Space Administration in avoiding disruption of operations at Cape Kennedy. As to this, the Solicitor General states that

> "the decision below might lead to significant labor unrest [at Cape Kennedy]."

The Railway Labor Act and the National Labor Relations Act each contain special provisions for resolution of jurisdictional disputes between *unions* (e.g., RLA, § 2, Ninth; NLRA, §§ 8(b)(4)(D), 8(b)7, 9(c), 10(k)). On May 26, 1961, the President established a special Missile and Space Sites Labor Board (Executive Order No. 10946), partly in order to facilitate resolution of jurisdictional disputes between *unions* at places such as Cape Kennedy and the Nevada Test Site; in that connection, the Executive

Order recited that "uninterrupted * * * operations at missile and space sites are imperative."

Here we have a jurisdictional dispute between *unions,* which threatens to interrupt such operations, and whose resolution happens to depend upon resolution of a *jurisdictional dispute between the two federal agencies* charged by statute with resolving such jurisdictional disputes between *unions.*

We submit that it *is* "of sufficient importance in the field of labor management relations" (Memorandum, p. 13), that jurisdictional conflicts between national agencies charged with preventing interruptions in work be resolved before such conflicts cause, at missile and space sites, the very interruptions which those very agencies are severally charged with preventing. We also think it important that Pan American World Airways, Inc., an air carrier and government contractor, and other air carriers similarly situated, shall be able to perform their government contracts and carry on their airline operations without interruptions resulting from jurisdictional conflicts between these agencies, or from conflicts between the agencies and the Courts with respect to agency jurisdiction.

Respectfully submitted,

JESSE FREIDIN
Attorney for Petitioner
598 Madison Avenue
New York 22, N. Y.

HERBERT PRASHKER
598 Madison Avenue
New York 22, New York
Of Counsel